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2 NOT FOR PUBLICATION

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Obeidalla Birair, et al.,

10 Plaintiffs,

11 v.

12 Edmond Kolycheck, et al.,

13 Defendants.
14

No. CV-15-01807-PHX-DJH

ORDER

15 Pending before the Court is Plaintiffs' Motion in Limine re Defendants' Expert
16 Karen Kline (Doc. 116) and Plaintiffs' Motion for Summary Ruling on Plaintiffs' Motion
17 in Limine Re: Defendants' Expert Karen Kline (Doc. 147). Defendants have responded to
18 the Motion in Limine (Doc. 131), and the Court heard oral argument on the Motion in
19 Limine at the Final Pretrial Conference held on January 25, 2019 (Doc. 137, Doc. 142).
20 Pursuant to the Court's instructions, Plaintiffs have also filed Supplemental Briefing in
21 Support of the Motion in Limine (Doc. 144). Defendants did not submit Supplemental
22 Briefing in Opposition to the Motion in Limine.

23 **A. Background**

24 Plaintiffs' Motion in Limine re Defendants' Expert Karen Kline sought exclusion
25 of the following three opinions:

26 **Ms. Kline's Opinion No. 1:** It is my opinion the CPS response to the report
27 alleging abuse and neglect of Mo.B., A.B., Hy.B., Ha.B. and Mu.B. were
28 completed within accepted standards of practice. Removal of Mo.B., A.B.,
Hy.B., Mu.B., and Ha.B. from Mr. and Mrs. Birair was appropriate and
consistent with DCS policy, procedure and state law.

1 **Ms. Kline’s Opinion No. 2:** It is my opinion no warrant was required as
2 there was probable cause to believe that the children were in imminent danger
if left in the care of their parents.

3 **Ms. Kline’s Opinion No. 3:** It is my opinion that once the dependency
4 petition is filed, all decisions about custody, placement, visitation, services
and the case plan are addressed through the court process. . . .

5 (Doc. 116 at 1-3).

6 At the January 25, 2019, Final Pretrial Conference, the Court heard testimony
7 regarding the Motion in Limine. (Doc. 142 at 31-37). At that time, the Court granted the
8 Motion in Limine regarding Opinions Two and Three. (*Id.* at 36 – 37). Regarding Opinion
9 One, the Court expressed concern regarding the materials on which Ms. Kline based her
10 opinion. (*Id.* at 32-33). The Court stated:

11 The concern that I have, without knowing specifically what she was provided
12 with, is of course under 702 she had to base her opinions on facts and data
that were provided to her. . . .

13 And I didn’t see in her report any reference to how Mr. Kolycheck’s initial
14 determination that he then backs away from affects her analysis. And that’s
what I’m concerned about. . . .

15 I don’t know whether or not any of that information or that alleged
16 information were provided to Ms. Kline in order that she consider that as part
17 of her analysis in her conclusion. And so under the 702 standard, it’s very
18 difficult for me to understand whether or not this qualifies as an expert
opinion, because she’s – the record does not support that she did have this
information.

19 (*Id.*) The Court additionally noted concern with jury confusion regarding Opinion One.
20 (*Id.* at 37).

21 The Court concluded that portion of the Final Pretrial Conference by stating that,
22 “without understanding what it is that [Ms. Kline] based that opinion on and whether
23 indeed she did apply the facts as uncovered in discovery with respect to Mr. Kolycheck’s
24 affidavit with respect to whatever the evidence is related to Ms. Padmore and Carrion, then
25 without an understanding of that being considered by her, I would have to agree with Mr.
26 Blackhurst that it doesn’t come in.” (*Id.* at 37). Therefore, the Court ordered that the
27 parties provide a supplement regarding the evidence provided to Ms. Kline: “As to
28 Plaintiff’s Motion in Limine re: Defendant’s Expert Karen Kline, the parties shall file any

1 supplement thereto 45 days prior to the trial date.” (Doc. 137).

2 On March 22, 2019, Plaintiffs submitted supplemental briefing in support of the
3 Motion in Limine. (Doc. 144). Defendants did not submit supplemental briefing in support
4 of their Response to the Motion in Limine.

5 **B. Analysis**

6 For a qualified expert witness to testify regarding an opinion, the testimony must be
7 “based upon sufficient facts or data.” Fed. R. Evid. 702(b). As discussed in Plaintiffs’
8 Supplemental Briefing in Support of the Motion in Limine (Doc. 144), it appears that Ms.
9 Kline’s expert report did not consider the additional evidence revealed in Mr. Kolycheck’s
10 deposition and Ms. Carrion’s deposition. This is because the expert report, dated
11 December 22, 2016, was issued before the depositions were taken in June and July of 2017.
12 Accordingly, Ms. Kline’s Opinion One could not have been based on sufficient facts or
13 data, as required by Rule 702.

14 The Court notes that, although not provided to this Court, Ms. Kline has apparently
15 prepared an amended version of her report, dated March 21, 2019.¹ That Amended Report
16 lists additional records reviewed, including the depositions of Mr. Kolycheck and Ms.
17 Carrion, as well as the briefing and Order on the parties’ Motions for Summary Judgment.
18 Notably, however, Ms. Kline’s Opinion One appears unaltered from its original 2016
19 version. Therefore, because Opinion One did not incorporate any acknowledgement of the
20 additional records, the Court can only conclude that Ms. Kline did not consider those
21 records in restating Opinion One. This is especially true based on the absence of
22 supplemental briefing by Defendants regarding this issue. This Court specifically provided
23 Defendants the opportunity to submit supplemental briefing to resolve the concerns the
24 Court expressed at the Final Pretrial Conference. (Doc. 137; Doc. 142 at 37). Without
25 such supplemental briefing from Defendants to assist the Court, the Court must conclude
26 that Ms. Kline’s Opinion One is not in compliance with Rule 702 of the Federal Rules of
27 Evidence.

28 ¹The Amended Report is attached as Exhibit A to Plaintiffs’ Motion to Exclude
Defendants’ Late Disclosed Amended Expert Report. (Doc. 146).

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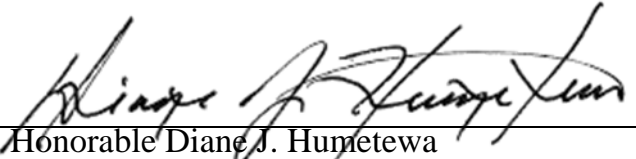
C. Conclusion

Based on the foregoing,

IT IS ORDERED granting Plaintiffs’ Motion in Limine re Defendants’ Expert Karen Kline. (Doc. 116).

IT IS FURTHER ORDERED granting Plaintiffs’ Motion for Summary Ruling on Plaintiffs’ Motion in Limine Re: Defendants’ Expert Karen Kline (Doc. 147).

Dated this 5th day of April, 2019.



Honorable Diane J. Humetewa
United States District Judge